

ALABAMA DEPARTMENT OF  
ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF: \_\_\_\_\_ )

Town of Flomaton \_\_\_\_\_ )

Flomaton, Escambia County, Alabama \_\_\_\_\_ )

CONSENT ORDER NO: 17-\_\_-CAP

PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter, “the Department” and/or “ADEM”) and the Town of Flomaton (hereinafter, the “Town”), pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code, §§22-22A-1 through 22-22A-16, (2006 Rplc. Vol.), the Alabama Air Pollution Control Act, Ala. Code §§22-28-1 to 22-28-23 (2006 Rplc. Vol.), and the regulations promulgated pursuant thereto.

STIPULATIONS

1. The Town is located in Escambia County, Alabama.
2. The Department is a duly constituted department of the State of Alabama pursuant to Ala. Code §§ 22-22A-1 to 22-22A-16 (2006 Rplc. Vol.).
3. Pursuant to Ala. Code § 22-22A-4(n) (2006 Rplc. Vol.), the Department is the state air pollution control agency for the purposes of the federal Clean Air Act, 42 U.S.C. 7401 to 7671q, as amended. In addition, the Department is authorized to administer

and enforce the provisions of the Alabama Air Pollution Control Act, Ala. Code §§ 22-28-1 to 22-28-23 (2006 Rplc. Vol.).

4. ADEM Admin. Code r. 335-3-3-.01(2)(b)1 states that “....open burning must take place on the property on which the combustible fuel originates.”

5. ADEM Admin. Code r. 335-3-3-.01(2)(b)4 states that “Only vegetation and untreated wood may be burned. It is unauthorized to open burn heavy oils, asphalt products, plastics, vinyl materials, insulation, paper, cardboard, natural or synthetic rubber, salvage or scrap materials, chemicals, garbage, treated or painted wood, or any trash.”

#### DEPARTMENT'S CONTENTIONS

6. On February 28, 2017, the Department received a complaint stating that materials consisting of lumber, roofing materials, plastics, plumbing materials, and possibly hazardous chemical wastes had been dumped on city property located at 698 McCurdy Street (hereinafter, the “Site”) in Flomaton.

7. On March 9, 2017, the Department followed up on the complaint by conducting an inspection of the Site and noted that the imported materials had been illegally burned. The inspector noted that the burn pile consisted of, but was not limited to, dimensional lumber, plastics, and scrap metals.

8. On March 22, 2017, in a telephone conversation with Town Mayor Bondurant, the Department was informed that the Town authorized importation of the materials burned at the Site.

9. On March 29, 2017, the Department issued a Notice of Violation (“NOV”) to the Town for unauthorized open burning of imported materials in violation of ADEM Admin. Code r. 335-3-3-.01 (2)(b)1 and ADEM Admin. Code r. 335-3-3-.01 (2)(b)4.

10. On May 3, 2017, the Department received the Town’s response to the NOV stating that it authorized the materials to be imported to the Site and burned.

11. Pursuant to Ala. Code § 22-22A-5(18)c., *as amended*, in determining the amount of any penalty, the Department must give consideration to the seriousness of the violation, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by such person; the economic benefit which delayed compliance may confer upon such person; the nature, extent and degree of success of such person's efforts to minimize or mitigate the effects of such violation upon the environment; such person's history of previous violations; and the ability of such person to pay such penalty. Any civil penalty assessed pursuant to this authority shall not exceed \$25,000.00 for each violation, provided however, that the total penalty assessed in an order issued by the Department shall not exceed \$250,000.00. Each day such violation continues shall constitute a separate violation. In arriving at this civil penalty, the Department has considered the following:

A. SERIOUSNESS OF THE VIOLATION: The Town conducted illegal open burning of imported materials and the Department considers this violation to be serious.

B. THE STANDARD OF CARE: There appeared to be no care taken by the Town to comply with the applicable requirements of the ADEM Admin. Code rs. 335-3-3-.01(2)(b)1 and 335-3-3-.01(2)(b)4.

C. ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: The Town likely derived nominal economic benefit by not legally disposing of the debris.

D. EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATION UPON THE ENVIRONMENT: There were no efforts by the Town to mitigate possible effects of these violations upon the environment.

E. HISTORY OF PREVIOUS VIOLATIONS: The Town has no previous history of violations with the Department for illegal open burning.

F. THE ABILITY TO PAY: The Town has alleged an inability to pay the civil penalty.

G. OTHER FACTORS: It should be noted that this Special Order by Consent is a negotiated settlement and, therefore, the Department has compromised the amount of the penalty to resolve this matter amicably without incurring the unwarranted expense of litigation.

12. The Department has carefully considered the six statutory penalty factors enumerated in Ala. Code § 22-22A-5(18)c., as amended, as well as the need for timely and effective enforcement, and has concluded that a civil penalty herein is appropriate (*See* “Attachment A”, which is hereby incorporated into the Department’s Contentions).

13. The Department neither admits nor denies the Town’s contentions, which are set forth below. The Department has agreed to the terms of this Consent Order in an effort to resolve the alleged violations cited herein without unwarranted expenditure of State resources in prosecuting the above violations. The Department has determined that the terms contemplated in this Consent Order are in the best interests of the citizens of Alabama.

### TOWN'S CONTENTIONS

14. The Town neither admits nor denies the Department's Contentions. The Town consents to abide by the terms of this Consent Order and pay the civil penalty assessed herein.

### ORDER

THEREFORE, the Town, along with the Department, desires to resolve and settle the compliance issues cited above. The Department has carefully considered the facts available to it and has considered the six penalty factors enumerated in Ala. Code § 22-22A-5(18)c., *as amended*, as well as the need for timely and effective enforcement and has determined that the following conditions are appropriate to address the violations alleged herein. Therefore, the Department and the Town agree to enter into this Consent Order with the following terms and conditions:

A. The Town agrees to pay the Department a civil penalty in the amount of \$1,500.00 in settlement of the violations alleged herein in six monthly installment payments. The first payment of \$250.00 shall be paid in full within forty-five days from the date of issuance of this Consent Order. The remaining five installment payments of \$250.00 shall be paid in full by the fifteenth day of each month thereafter. Failure to pay the civil penalty within the specified timeframe after the issuance of this Consent Order may result in the Department filing a civil action in the Circuit Court of Montgomery County to recover the unpaid civil penalty.

B. The Town agrees that all penalties due pursuant to this Consent Order shall be made payable to the Alabama Department of Environmental Management by certified or cashier's check and shall be remitted to:

Office of General Counsel  
Alabama Department of  
Environmental Management  
P.O. Box 301463  
Montgomery, Alabama 36130-1463

C. The Town agrees that, immediately upon receipt of this Order and continuing thereafter, it shall ensure immediate and future compliance with ADEM Admin. Code rs. 335-3-3-.01(2)(b)1 and 335-3-3-.01(2)(b)4.

D. The parties agree that this Consent Order shall apply to and be binding upon both parties, their directors, officers, and all persons or entities acting under or for them. Each signatory to this Consent Order certifies that he or she is fully authorized by the party he or she represents to enter into the terms and conditions of this Consent Order, to execute the Consent Order on behalf of the party represented, and to legally bind such party.

E. The parties agree that, subject to the terms of these presents and subject to provisions otherwise provided by statute, this Consent Order is intended to operate as a full resolution of the alleged violations and/or deviations which are cited in this Consent Order.

F. The Town agrees that it is not relieved from any liability if it fails to comply with any provision of this Consent Order.

G. For purposes of this Consent Order only, the Town agrees that the Department may properly bring an action to compel compliance with the terms and conditions contained herein in the Circuit Court of Montgomery County. The Town also agrees that in any action brought by the Department to compel compliance with the terms



of this Agreement, the Town shall be limited to the defenses of *Force Majeure*, compliance with this Agreement and physical impossibility. A *Force Majeure* is defined as any event arising from causes that are not foreseeable and are beyond the reasonable control of the Town, including its contractors and consultants, which could not be overcome by due diligence (i.e., causes which could have been overcome or avoided by the exercise of due diligence will not be considered to have been beyond the reasonable control of the Town) and which delays or prevents performance by a date required by the Consent Order. Events such as unanticipated or increase costs of performance, changed economic circumstances, normal precipitation events, or failure to obtain federal, state, or local permits shall not constitute *Force Majeure*. Any request for a modification of a deadline must be accompanied by the reasons (including documentation) for each extension and the proposed extension time. This information shall be submitted to the Department a minimum of ten working days prior to the original anticipated completion date. If the Department, after review of the extension request, finds the work was delayed because of conditions beyond the control and without the fault of the Town, the Department may extend the time as justified by the circumstances. The Department may also grant any other additional time extension as justified by the circumstances, but it is not obligated to do so.

H. The Department and the Town agree that the sole purpose of this Consent Order is to resolve and dispose of all allegations and contentions stated herein concerning the factual circumstances reference herein. Should additional facts and circumstances be discovered in the future concerning illegal open burning which would constitute possible violations not addressed in this Consent Order, then such future violations may be addressed in Orders as may be issued by the Director, litigation initiated by the Department,

or such other enforcement action as may be appropriate, and the Town shall not object to such future orders, litigation, or enforcement action based on the issuance of this Consent Order if future orders, litigation, or other enforcement action addresses new matters not raised in this Consent Order.

I. The Department and the Town agree that this Consent Order shall be considered final and effective immediately upon signature of all parties. This Consent Order shall not be appealable, and the Town does hereby waive any hearing on the terms and conditions of the same.

J. The Department and the Town agree that this Order shall not affect its obligation to comply with any Federal, State, or local laws or regulations.

K. The Department and the Town agree that final approval and entry into this Order are subject to the requirements that the Department give notice of proposed Orders to the public, and that the public have at least thirty days within which to comment on the Order.

L. The Department and the Town agree that, should any provision of this Order be declared by a court of competent jurisdiction or the Environmental Management Commission to be inconsistent with Federal or State law and therefore unenforceable, the remaining provisions hereof shall remain in full force and effect.

M. The Department and the Town agree that any modifications of this Order must be agreed to in writing signed by both parties.

N. The Department and the Town agree that, except as otherwise set forth herein, this Order is not and shall not be interpreted to be a permit or modification of an existing permit under Federal, State, or local law, and shall not be construed to waive or relieve the Town of his obligations to comply in the future with any permit.



Executed in duplicate, with each part being an original.

TOWN OF FLOMATON

ALABAMA DEPARTMENT OF  
ENVIRONMENTAL MANAGEMENT



Dewey J. Bondurant, Jr.  
Mayor

Lance R. LeFleur  
Director

7-20-2017

(Date)

(Date Executed)

## ATTACHMENT A

### Town of Flomaton Flomaton, Escambia County

Violation*	Number of Violations*	Seriousness of Violation*	Standard of Care*	History of Previous Violations*	
Illegal open burning	1	\$1,000	\$500	\$0	
					<b>Total of Three Factors</b>
<b>TOTAL PER FACTOR</b>		<b>\$1,000</b>	<b>\$500</b>	<b>\$0</b>	<b>\$1,500</b>

Adjustments to Amount of Initial Penalty	
Mitigating Factors (-)	
Ability to Pay (-)	\$500
Other Factors (+/-)	
Total Adjustments (+/-) <i>Enter at Right</i>	\$500

Economic Benefit (+)	\$500
Amount of Initial Penalty	\$2,000
Total Adjustments (+/-)	\$500
<b>FINAL PENALTY</b>	<b>\$1,500.00</b>

#### Footnotes

\* See the "Department's Contentions" portion of the Consent Order for a detailed description of each violation and the penalty factors.